

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Federal-State Joint Board on)	WC Docket No. 09-197
Universal Service)	
)	
Petition by NE Colorado Cellular, Inc.,)	
d/b/a Viaero Wireless)	
for Commission Agreement in)	
Redefining Certain Service Areas of)	
Incumbent Rural Telephone Companies)	
In the State of Kansas Pursuant to)	
47 C.F.R. Section 54.207(c))	

**PETITION FOR COMMISSION AGREEMENT IN REDEFINING CERTAIN
SERVICE AREAS OF RURAL INCUMBENT
TELEPHONE COMPANIES IN THE STATE OF KANSAS**

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SUMMARY

NE Colorado Cellular, Inc., d/b/a Viaero Wireless ("Viaero") requests the Commission's concurrence with the proposal by the State Corporation Commission of the State of Kansas ("Kansas Commission") to redefine the service areas of certain Kansas rural incumbent local exchange carriers ("LECs") pursuant to the process set forth in Section 54.207(c) of the Commission's Rules.

Viaero provides or will provide personal communications service on both a prepaid and postpaid basis in rural areas of Kansas, and was recently designated as an eligible telecommunications carrier ("ETC") by the Kansas Commission pursuant to Section 214(e) of the Communications Act of 1934. By granting ETC status to Viaero, the Kansas Commission found that the use of federal high-cost support to develop Viaero's competitive operations would serve the public interest.

Because Viaero's FCC-licensed service territory does not correlate with rural incumbent LEC service areas in Kansas, the Act provides that the affected rural incumbent LEC service areas must be redefined before Viaero's ETC designation in certain areas can take effect. Accordingly, the Kansas Commission has proposed that each wire center of each affected rural incumbent LEC should be redefined as a separate service area, so that Viaero's designation can become effective throughout the portions of each incumbent LEC service area in which it is licensed to provide service. Consistent with the Kansas Commission's order, and with previous actions taken by the FCC and several other state regulatory commissions, redefinition is requested in this Petition such that each wire center of each affected incumbent LEC is reclassified as a separate service area.

The requested redefinition is warranted under the Commission's competitively neutral universal service policies, and it constitutes precisely the same relief granted to similarly situated

carriers by the Commission and several states. Unless the relevant incumbent LEC service areas are redefined, Viaero will be unable to use high-cost support to improve and expand service to consumers in many areas of its licensed service territories in Kansas, and consumers will be denied the corresponding benefits.

As the Commission and several states have consistently held, competitive and technological neutrality demands the removal of these artificial barriers to competitive entry. Moreover, the requested redefinition satisfies the analysis provided to the Commission by the Federal-State Joint Board on Universal Service (“Joint Board”), in that it would not involve the payment of uneconomic support or cream skimming opportunities, it duly recognizes the special status of rural carriers under the Act, and it does not impose undue administrative burdens on incumbent LECs.

The Kansas Commission’s proposed redefinition is well-supported by the record at the state level, and all affected parties were provided ample opportunity to ensure that the Joint Board’s recommendations were taken into account. No party filed in opposition to Viaero’s petition in the Kansas Commission’s proceeding. Accordingly, Viaero requests that the Commission grant its concurrence expeditiously and allow the proposed redefinition of incumbent LEC service areas to become effective without further action.

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NE Colorado Cellular, Inc., d/b/a Viaero Wireless ("Viaero") submits this Petition seeking the agreement of the Commission with the decision of the State Corporation Commission of the State of Kansas ("Kansas Commission" or "KCC") to redefine the service areas of certain rural incumbent local exchange carriers ("LECs") doing business in Kansas, so that each of the incumbent LECs' wire centers constitutes a separate service area.

Viaero provides personal communications service ("PCS"), on both a prepaid and post-paid basis, in rural Kansas, and was recently granted eligible telecommunications carrier ("ETC") status by the Kansas Commission¹ pursuant to Section 214(e)(2) of the Communica-

¹ *Petition of NE Colorado, Inc. d/b/a Viaero Wireless, for Designation as an Eligible Telecommunications Carrier 47 U.S.C. 214(e)(2) and for Redefinition of Rural ILEC Service Areas*, Docket No. 09-NECZ-747-ETC, Order Designating Viaero Wireless as an ETC in Certain AT&T and RLEC Exchanges and Granting in Part and Denying in Part Request for Redefinition of Certain Rural Study Areas, adopted June 4, 2010 ("*KCC Order*"), at 6 (paras. A, B

tions Act of 1934 (“Act”).² In its designating Order, the Kansas Commission redefined several rural incumbent LEC service areas.³ The *KCC Order* specified that the redefinitions adopted by the Kansas Commission would take effect only upon a grant of concurrence by the FCC.⁴

As set forth in the following sections, classifying each individual wire center covered by the Petition as a separate service area will foster federal and state goals of encouraging competition in the telecommunications marketplace, and of extending universal service to consumers in rural Kansas.⁵

I. BACKGROUND.

A. Statutory and Regulatory Requirements and Processes for Redefinition of Service Areas.

Pursuant to Section 214(e) of the Act,⁶ state commissions generally have authority to designate carriers that satisfy the requirements of the federal universal service rules as ETCs and to define their service areas.⁷ In rural areas, service areas are generally defined as the incumbent LEC’s study area. The Act, however, explicitly sets forth a process whereby a competitive ETC may be designated for a service area that differs from that of the incumbent LEC. Specifically, Section 214(e) of the Act provides that:

& C). The *KCC Order* is attached in Appendix 1. See Letter from Christine Aarnes, Chief of Telecommunications, KCC, to Karen Majcher, Universal Service Administrative Company, July 2, 2010, at 1 (indicating that the Kansas Commission had “determined that Viaero has met the federal requirements and that it is in the public interest to designate Viaero as an ETC”).

² 47 U.S.C. § 214(e)(2).

³ *KCC Order* at 6 (para. D).

⁴ *Id.* at 4 (para. 12).

⁵ As noted in the KCC Staff Report, approval of Viaero’s request for redefinition of incumbent LEC study areas will have no effect on the size of the federal Universal Service Fund (“USF”), because the Commission has capped the USF. Kansas Commission Utilities Staff Report and Recommendation, Mar. 29, 2010 (“KCC Staff Report”) at 12. See *High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008), *aff’d*, *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009). The KCC Staff Report is attached in Appendix 2.

⁶ 47 U.S.C. § 214(e).

⁷ *Id.*

“[S]ervice area” means such company’s [*i.e.*, the incumbent LEC’s] “study area” unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c) [of the Act], establish a different definition of service area for such company.⁸

The Commission and the Federal-State Joint Board on Universal Service (“Joint Board”) have recognized that a strict rule requiring a competitive ETC to serve an area exactly matching a rural incumbent LEC’s study area would preclude competitive carriers that fully satisfy ETC requirements from bringing the benefits of competition to consumers throughout their service territory.⁹

The Commission therefore established a streamlined procedure for the Commission and the states to act together to redefine rural incumbent LEC service areas.¹⁰ Using this procedure, the FCC and state commissions have applied the analysis contained in Section 214(e) of the Act and concluded that it is necessary and appropriate to redefine rural incumbent LEC service areas along wire center boundaries to permit the designation of competitive ETCs in those areas.¹¹ This process, as well as the underlying necessity of redefinition, was reaffirmed in the Commission in the *ETC Report and Order* five years ago.¹²

⁸ *Id.*

⁹ See *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support*, CC Docket No. 96-45, Memorandum Opinion and Order, 15 FCC Rcd 9924, 9927 n.40 (Com. Car. Bur. 1999) (“*Washington Redefinition Order*”), citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 181 (Jt. Bd. 1996) (“*Joint Board Recommended Decision*”).

¹⁰ See 47 C.F.R. § 54.207(c). See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8881 (1997) (“*First Report and Order*”) (subsequent history omitted).

¹¹ See, e.g., *Smith Bagley, Inc., Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. on Tribal Lands Within the State of Arizona*, Public Notice, DA 01-409 (rel. Feb. 15, 2002) (effective May 16, 2002); *Washington Redefinition Order*, 15 FCC Rcd at 9927-28.

¹² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371 (2005) (“*ETC Report and Order*”).

B. Viaero Petition Filed with Kansas Commission.

On March 20, 2009, Viaero filed a petition requesting ETC designation for the purpose of receiving both federal and state universal service support. In its initial petition, Viaero requested ETC designation in several specific wire centers throughout Kansas.¹³

On August 4, 2009, Viaero filed an amended petition requesting ETC designation for federal and state universal service support for additional exchanges in Kansas. The additional requested exchanges referenced in the amended petition are served by AT&T, Rural Telephone Company, Gorham Telephone Company, Golden Belt Telephone Association (“Golden Belt”), United Telephone Association, Inc., S&T Telephone Cooperative Association, and Sunflower Telephone Company.¹⁴ Viaero also filed Errata to its Amended Petition (“Errata”) on February 23, 2010.¹⁵ The Errata corrected the Viaero Amended Petition with respect to certain exchanges serviced by Twin Valley Telephone, Inc. (“Twin Valley”) and Wheat State Telephone (“Wheat State”).¹⁶

C. Kansas Commission Order.

The Kansas Commission issued an Order on September 10, 2010, designating Viaero as an ETC in certain AT&T and rural incumbent LEC exchanges, and also granted in part and denied in part Viaero’s request for redefinition of certain rural incumbent LEC service areas.¹⁷

¹³ See KCC Staff Report at 1.

¹⁴ Verified Amended Petition of NE Colorado Cellular, Inc., d/b/a Viaero Wireless, for Designation as an Eligible Telecommunications Carrier and for Redefinition of Rural ILEC Service Areas, *Petition of NE Colorado, Inc. d/b/a Viaero Wireless, for Designation as an Eligible Telecommunications Carrier 47 U.S.C. 214(e)(2) and for Redefinition of Rural ILEC Service Areas*, Docket No. 09-NECZ-747-ETC, filed Aug. 4, 2009 (“Viaero Amended Petition”). The Viaero Amended Petition is attached in Appendix 3.

¹⁵ Errata to Amended Petition, *Petition of NE Colorado, Inc. d/b/a Viaero Wireless, for Designation as an Eligible Telecommunications Carrier 47 U.S.C. 214(e)(2) and for Redefinition of Rural ILEC Service Areas*, Docket No. 09-NECZ-747-ETC, filed Feb. 23, 2010 (“Errata”). The Errata are attached in Appendix 4.

¹⁶ See KCC Staff Report at 1-2.

¹⁷ See KCC Order at 1.

Based upon KCC Staff recommendations, the Kansas Commission redefined the service areas of Golden Belt, S&T Telephone Cooperative Association (“S&T”), Tri-County Telephone Association (“Tri-County”), Twin Valley, and Wheat State, such that each of the wire centers throughout each study area was redefined as a separate service area.¹⁸ The Kansas Commission also designated Viaero as an ETC in the portions of those study areas it could serve.¹⁹ Also, based upon recommendations made by the KCC Staff, the Kansas Commission declined to re-define the service areas of five specified rural incumbent LECs and denied Viaero’s request to be designated as an ETC in those service areas.²⁰

The Kansas Commission indicated that Viaero had been advised “that it would need to obtain the FCC’s approval of the redefinition of these RLECs.”²¹ Viaero now petitions the FCC

¹⁸ KCC Order at 6 (para. D).

¹⁹ The individual wire centers in which Viaero was designated within the listed ILEC study areas are as follows:

RURAL ILEC STUDY AREA	WIRE CENTERS	
Golden Belt	Ellis Utica Ransom Brownell McCracken	Alexander Bazine Ness City Beeler Burdett
S&T	Kanorado	Brewster
Tri-County	Dwight White City Delevan	Wilsey Lost Springs Dunlap
Twin Valley	Greenleaf Clifton Morganville Green Wakefield	Longford Leonardville Riley Olsburg
Wheat State	Matfield Green	Olpe

²⁰ *Id.* at 6 (para. E).

²¹ *Id.* at 4 (para. 12).

for concurrence with the redefinition of the affected rural incumbent LEC service areas set forth in the *KCC Order*.

II. DISCUSSION

The Kansas Commission's decision to redefine certain specified rural incumbent LEC service areas, as requested by Viaero, is consistent with the competitively neutral universal service policies reflected in the Act (as amended by the Telecommunications Act of 1996²²), with the FCC's rules, and with the recommendations of the Joint Board.

Specifically, the Kansas Commission's action in redefining the affected rural incumbent LEC service areas so that each wire center is a separate service area will promote competition²³ and the ability of rural consumers to have similar choices among telecommunications services, at rates that are comparable to those available in urban areas.²⁴ The proceedings at the state level provided all affected parties with an opportunity to comment on the proposed redefinition, but "[n]o public comments were received."²⁵ Thus, there was no opposition to Viaero's proposed service area redefinitions from any of the affected rural incumbent LECs, or from any competitor. The record at the state level demonstrates that the service area redefinitions adopted by the Kansas Commission fully comport with federal requirements, and provides the FCC with an ample basis for concurring in the Kansas Commission's action.

²² Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

²³ *Cf.* KCC Staff Report at 20-21 (indicating that applicable Kansas law requires that disbursements from the Kansas USF must be made "in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers and wireless telecommunications providers, that are deemed eligible both under subsection (e)(1) of section 214 of the federal act and by the commission").

²⁴ See 47 U.S.C. § 254(b)(3). See also OMNIBUS BROADBAND INITIATIVE (OBI), FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket No. 09-51, at 146 (2010) ("National Broadband Plan") (indicating that recipients of funding, pursuant to new USF support mechanisms recommended in the National Broadband Plan, "should offer service at rates reasonably comparable to urban rates").

²⁵ *KCC Order* at 2 (para. 3).

A. The Requested Redefinition of Service Areas in Kansas Is Consistent With Federal Universal Service Policy.

Congress, in passing the 1996 Act, declared its intent to “promote competition and reduce regulation” and to “encourage the rapid deployment of new telecommunications technologies.”²⁶ As part of its effort to further these pro-competitive goals, Congress enacted new universal service provisions that, for the first time, envision multiple ETCs providing services in the same market.²⁷ In furtherance of this statutory mandate, the Commission has adopted the principle that universal service mechanisms must be administered in a competitively and technologically neutral manner, meaning that no particular type of carrier or technology should be unfairly advantaged or disadvantaged by the Commission’s universal service rules.²⁸

Consistent with this policy, the Commission and many state commissions have affirmed that ETC service areas should be defined in a manner that removes obstacles to competitive entry.²⁹ In 2002, for example, the Commission granted a petition of the Colorado Public Utilities Commission (“CPUC”) for a service area redefinition substantially similar to the redefinition proposed in this Petition.³⁰ In support of redefining the service area of CenturyTel of Eagle, Inc.

²⁶ 1996 Act (preamble).

²⁷ See 47 U.S.C. § 214(e)(2).

²⁸ *First Report and Order*, 12 FCC Rcd at 8801. Competitive neutrality is a fundamental principle of the Commission’s universal service policies. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Seventh Report and Order and Thirteenth Order on Reconsideration, *Access Charge Reform*, CC Docket No. 96-262, Fourth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 8077, 8113 (1999) (subsequent history omitted).

²⁹ See, e.g., *First Report and Order*, 12 FCC Rcd at 8882-83 (footnotes omitted):

[U]niversal service policy objectives may be best served if a state defines rural service areas to consist only of the contiguous portion of a rural study area, rather than the entire rural study area. We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers. We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service.

³⁰ See CPUC Petition at 5 (indicating that the “Petitioner requests agreement to redefine CenturyTel’s service area to the wire center level”).

("CenturyTel"), along wire-center boundaries, the CPUC emphasized that "in CenturyTel's service area, no company could receive a designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado . . . [T]his constitutes a significant barrier to entry."³¹ The FCC agreed and, by declining to open a proceeding, allowed the requested redefinition to take effect.³²

Similarly, the Commission approved a petition filed jointly by the Washington Utilities and Transportation Commission ("WUTC") and twenty rural incumbent LECs for the redefinition of the incumbent LECs' service areas along wire center boundaries, finding that:

[O]ur concurrence with rural LEC petitioners' request for designation of their individual exchanges as service areas is warranted in order to promote competition. The Washington Commission is particularly concerned that rural areas . . . are not left behind in the move to greater competition. Petitioners also state that designating eligible telecommunications carriers at the exchange level, rather than at the study area level, will promote competitive entry by permitting new entrants to provide service in relatively small areas We conclude that this effort to facilitate local competition justifies our concurrence with the proposed service area redefinition.³³

In Washington, several competitive ETCs have been designated in various service areas without any apparent adverse consequences. No incumbent LEC in Washington has introduced evidence that it, or consumers, have been harmed by the WUTC's service area redefinition.³⁴

³¹ *Id.* at 4.

³² CenturyTel filed an application for review of the FCC's concurrence in the redefinition, but subsequently withdrew its application. *Federal-State Joint Board on Universal Service, Petition of the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. 54.207(c), for Commission Agreement in Redefining the Service Area of CenturyTel of Eagle, Inc., a Rural Telephone Company*, CC Docket No. 96-45, Order, 25 FCC Rcd 203 (Telecom. Access Pol. Div., WCB 2010).

³³ *Washington Redefinition Order*, 15 FCC Rcd at 9927-28 (footnotes omitted).

³⁴ See *Sprint Corp. d/b/a Sprint PCS et al.*, Docket No. UT-043120, Order Granting Petition for Designation as an Eligible Telecommunications Carrier, at 11 (WUTC, Jan. 13, 2005):

The Commission's experience is that this approach [*i.e.*, the designation of multiple competitive ETCs], if not benefiting customers (which it does), certainly is not failing customers. In the five years since we first designated an additional ETC in areas served by rural telephone companies, the Commission has received only two customer complaints in which the consumers alleged that a *non-rural*, wireline ETC was not providing service. No Rural ILEC has requested an increase in

Other state commissions have similarly concluded that redefining rural independent LEC service areas along wire center boundaries is fully justified by the pro-competitive goals of the 1996 Act. For example, the Minnesota Public Utilities Commission (“PUC”) approved the proposal by WWC Holding Co., Inc. d/b/a CellularOne to redefine certain rural incumbent LEC service areas to the wire center level.³⁵ Addressing the concerns expressed by incumbent LEC commenters, the PUC concluded that the proposed redefinition would neither harm the affected rural incumbent LECs nor create significant cream-skimming opportunities.³⁶ The FCC agreed, and allowed the proposed redefinition to enter into effect. Similar conclusions were reached by regulators in other states, including Arizona, Colorado, New Mexico, Illinois, Maine, Michigan, the Dakotas, Oklahoma, Oregon, Kentucky, Nebraska, Mississippi, and West Virginia.³⁷ The

revenue requirements based on need occasioned by competition from wireless or other ETCs. This record supports our practice of not seeking commitments or adding requirements as part of the ETC designation process.

³⁵ WWC Holding Co., Inc. d/b/a CellularOne, MPUC Docket No. P-5695/M-04-226, Order Approving ETC Designation (Minn. PUC, Aug. 19, 2004) (FCC concurrence granted Dec. 28, 2004).

³⁶ *Id.* at 9.

³⁷ See, e.g., Cellular Properties, Inc., Application for Designation as an Eligible Telecommunications Carrier for Purposes of Receiving Federal Universal Service Support Pursuant to Section 214(e)(2) of the Telecommunications Act of 1996, 47 U.S.C. § 214(e)(2), ICC Docket No. 070154, Order Ill. Comm. Comm’n, adopted Feb. 27, 2008) (FCC concurrence granted July 2, 2009); In the Matter of the Application of Leaco Rural Telephone Cooperative, Inc., as a CMRS Provider for Designation as Eligible Telecommunications Carrier for Additional Service Areas, Utility Case No. 07-00235-UT, Final Order, (N. Mex. PRC Nov. 13, 2008) (FCC concurrence granted June 11, 2009); Application of USCOC of Greater Missouri, LLC for Designation as an Eligible Telecommunications Carrier, Report and Order in Case No. TO-2005-0384 (Mo. PSC, adopted May 3, 2007) (FCC concurrence granted Apr. 28, 2008); In the Matter of Dobson Cellular Systems, Inc. and American Cellular Corp., Cause No. PUD 200500122 (July 5, 2006), approved with modifications by Final Order dated Jan. 18, 2007 (FCC concurrence granted Sept. 3, 2007); Illinois Valley Cellular RSA 2-I Partnership et al., Docket Nos. 04-0454 et al. (Ill. Commerce Comm’n, Apr. 19, 2006) (FCC concurrence granted Nov. 27, 2006); Brookings Municipal Utilities d/b/a Swiftel, TCO4-213 (S.D. PSC, Feb. 10, 2006) (FCC concurrence granted June 8, 2006); N.E. Colorado Cellular, Inc. d/b/a Viaero Wireless, Application No. C-3324 (Neb. PSC, Oct. 18, 2005) (FCC concurrence granted Apr. 11, 2006); Bluegrass Wireless, LLC, et al., Case Nos. 2005-00017 et al. (Ky. PSC, July 8, 2005) (FCC concurrence granted Feb. 15, 2006); RCC Minnesota, Inc. and Wireless Alliance, L.L.C. d/b/a Unicel, TC 03-193 (S.C. PUC June 6, 2005) (FCC concurrence granted Nov. 14, 2005); Centennial Tri-State Operating Partnership et al., Case No. 2003-UA-0234 (Miss. PSC, Aug. 10, 2004) (FCC concurrence granted Sept. 21, 2005); In the Matter of the Application of N.E. Colorado Cellular, Inc., to Re-define the Service Area of Eastern Slope Rural Telephone Association, Inc.; Great Plains Communications, Inc.; Plains Cooperative Telephone Association, Inc.; and Sunflower Telephone Co., Inc., Docket No. 02A-444T (ALJ, May 23, 2003), *aff’d* by Colo. PUC Oct. 2, 2003 (FCC concurrence granted May 23, 2005) RCC Minnesota, Inc. et al., Docket No. 2002-344 (Maine PUC May 13, 2003) (FCC concurrence granted Mar. 17, 2005); NPI-Omnipoint Wireless, LLC, Case No. U-13714 (Mich. PSC, Aug. 26, 2003) (FCC concurrence granted Feb. 1,

Kansas Commission and the FCC have also acted together previously to redefine rural incumbent LEC service areas in Kansas.³⁸

As in those cases, the redefinition requested in this proceeding will enable Viaero to make the network investments necessary to bring competitive services to consumers throughout its licensed service area. Redefinition will therefore benefit consumers in rural Kansas, who will gain access to a variety of services, with pricing packages and service options comparable to those available in urban areas.³⁹ They will see infrastructure investment in areas formerly controlled solely by incumbent LECs, which will bring improved wireless services and important health and safety benefits associated with increased levels of radiofrequency coverage. Redefinition will also remove a major obstacle to competition, consistent with federal telecommunications policy.⁴⁰

B. The Requested Redefinition Satisfies the Three Joint Board Factors Under Section 54.207(c)(1) of the Commission's Rules.

A petition to redefine an incumbent LEC's service area must contain "an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone

2005); Highland Cellular, Inc., Case No. 02-1453-T-PC, Recommended Decision (W.V. PSC Sept. 15, 2003), *aff'd* by Final Order Aug. 27, 2004 (FCC concurrence granted Jan. 24, 2005); United States Cellular Corp., Docket 1084 (Oregon PUC, June 24, 2004) (FCC concurrence granted Oct. 11, 2004); Cellular Mobile Systems of St. Cloud, Docket No. PT6201/M-03-1618 (Minn. PUC, May 16, 2004) (FCC concurrence granted Oct. 7, 2004); Northwest Dakota Cellular of North Dakota Limited Partnership d/b/a Verizon Wireless et al., Case No. PU-1226-03-597 et al. (N.D. PSC, Feb. 25, 2004) (FCC concurrence granted Sept. 15, 2004); Smith Bagley, Inc., Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation (N.M. Pub. Reg. Comm'n Aug. 14, 2001, adopted by Final Order (Feb. 19, 2002) (FCC concurrence granted June 11, 2002); Smith Bagley, Inc., Docket No. T-02556A-99-0207 (Ariz. Corp. Comm'n Dec. 15, 2000) (FCC concurrence granted May 16 and July 1, 2001).

³⁸ See RCC Minnesota, Inc., Docket No. 04-RCCT-338-ETC (KCC, Sept. 30, 2004) (FCC concurrence granted May 23, 2005).

³⁹ See 47 U.S.C. § 254(b)(3).

⁴⁰ See 1996 Act, Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 113 (emphasis added) (stating that the 1996 Act was designed to create "a pro-competitive, de-

company.”⁴¹ In the *Recommended Decision* that laid the foundation for the *First Report and Order*, the Joint Board enumerated three factors to be considered when reviewing a request to redefine a LEC’s service area.⁴² Each of these factors is discussed in the following sections.

1. Minimizing Potential for Cream Skimming.

The Joint Board expressed concern as to whether a competitive carrier would be attempting to “cream skim” by proposing to serve only the lowest cost exchanges.⁴³ As a wireless carrier, Viaero is restricted to providing service in those areas where it is licensed by the Commission. In requesting the redefinition of rural incumbent LEC services areas that are the subject of this Petition, Viaero made no attempt to single out low-cost exchanges, to the exclusion of other exchanges, in any of the subject service areas. On the contrary, the Kansas Commission designated Viaero for an ETC service area that is based on the geographic limitations of its licensed service territory, and that will not create cream-skimming opportunities for Viaero.⁴⁴

The Commission has clarified that cream-skimming opportunities arise when an ETC seeks designation in a “disproportionate share of the higher-density wire centers” in an incumbent LEC’s service area.⁴⁵ Opportunities for receiving uneconomic levels of support are diminished, however, by the Commission’s decision to allow rural incumbent LECs to disaggregate

regulatory national policy framework” aimed at fostering rapid deployment of telecommunications services to all Americans “by opening *all telecommunications markets* to competition”).

⁴¹ 47 C.F.R. § 54.207(c)(1).

⁴² *Joint Board Recommended Decision*, 12 FCC Rcd at 179-80, cited in *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1582 (2004) (“*Virginia Cellular*”).

⁴³ See *Joint Board Recommended Decision*, 12 FCC Rcd at 180.

⁴⁴ See *KCC Order* at 4 (paras. 11-12).

⁴⁵ *ETC Report and Order*, 20 FCC Rcd at 6392:

By serving a disproportionate share of the high-density portion of a service area, an ETC may receive more support than is reflective of the rural incumbent LEC’s costs of serving that wire center because support for each line is based on the rural telephone company’s average costs for serving the entire service area unless the incumbent LEC has disaggregated its support.

support below the study-area level.⁴⁶ The Commission has concluded that the availability of disaggregation enables incumbent LECs to protect themselves and substantially removes the ability of competitors to cream-skim:

We . . . also note that rural telephone companies now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service. *Therefore, any concern regarding "cream-skimming" of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated.*⁴⁷

Furthermore, any incumbent LECs that failed to disaggregate support effectively may modify their disaggregation filings subject to state approval.⁴⁸

The facts in this case meet the Commission's criteria in its analysis of population density as a means of determining the likelihood of Viaero's receiving uneconomic levels of support. In its decision in *Virginia Cellular*, the Commission noted that "[r]ural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area[.]"⁴⁹ and that, "[g]enerally, a request for ETC designation for an area less than the entire study area of a rural telephone company might raise concerns that the petitioner intends to creamskim in the rural study area."⁵⁰ The Commission relied upon an analysis of population density of each of the affected wire centers for purposes of determining whether grant of

⁴⁶ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244, 11302-09 (2001) ("*Fourteenth Report and Order*").

⁴⁷ *Federal-State Joint Board on Universal Service, Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133, 18141 (2001) (emphasis added) (footnote omitted). See *ETC Report and Order*, 20 FCC Rcd at 6393-94.

⁴⁸ See 47 C.F.R. §§ 54.315(b)(4), 54.315(c)(5), 54.315(d)(5).

⁴⁹ *Virginia Cellular*, 19 FCC Rcd at 1578.

⁵⁰ *Id.*

the redefinition proposed by the competitive ETC would result in any cream skimming. The Commission took this approach based on its conclusion that “a low population density typically indicates a high-cost area.”⁵¹

Adhering to the analysis developed and utilized by the FCC in *Virginia Cellular*,⁵² the Kansas Commission relied upon the results of population density analyses conducted by the KCC Staff in reaching its decision concerning Viaero’s request for the redefinition of the study areas that are the subject of this Petition. The Kansas Commission adopted the KCC Staff’s conclusion that no cream skimming will occur in any of the study areas in which Viaero sought redefinition.⁵³ A summary of the population density analyses conducted by the KCC Staff and adopted by the Kansas Commission follows:

■ **Golden Belt.**—The average population density for the 10 Golden Belt wire centers that Viaero will serve is 5.35 per square mile (“psm”), compared to 7.04 for the wire centers in which Viaero will not provide service. The average population density for the entire Golden Belt study area is 6.10 psm. Based on these calculations, the KCC Staff concluded that it had no cream skimming concerns with regard to the Golden Belt service area, “as Viaero is not proposing to serve only the highest-density, lowest-cost wire centers”⁵⁴

■ **Tri-County.**—The average population density for the six Tri-County wire centers that Viaero will serve is 9.61 psm, compared to 14.52 for the wire centers in which Viaero will not provide any service. In addition, the average population density per square mile for the entire Tri-County study area is 10.54 psm. The KCC Staff did not

⁵¹ *Id.* at 1579.

⁵² See *KCC Order* at 4 (para. 14).

⁵³ *Id.* at 4 (paras. 11-12).

have any cream skimming concerns with regard to the Tri- County service area based on its conclusion that Viaero was not proposing to serve only the highest-density, lowest-cost wire centers.⁵⁵

■ ***Twin Valley.***—The average population density for the nine Twin Valley wire centers that Viaero will serve is 15.42 psm, compared to 14.09 for the wire centers that Viaero will not be serving. The average population density for the entire Twin Valley study area is 14.69 psm. Although the population density per square mile of the area Viaero will serve is slightly higher than the area it will not be serving, the KCC Staff concluded that it did not have any cream skimming concerns, for two reasons. First, Viaero is not intending to serve only the highest-density, lowest-cost wire centers in the Tri-Valley study area. Second, Viaero will provide its services “to a mix of high-cost and low-cost customers.”⁵⁶

■ ***Wheat State.***— The KCC Staff determined that the average population density for the two Wheat State wire centers that Viaero will serve is 9.08 psm, compared to 23.96 for the wire centers in which Viaero will not provide service. The average population density for the entire Wheat State study area is 19.00 psm. These calculations led the KCC Staff to conclude that it did not have any cream skimming concerns with regard to the Wheat State service area. The KCC Staff based this conclusion on the fact that Viaero will not serve only the highest-density, lowest-cost wire centers in the study area.⁵⁷

In the case of the Golden Belt, Tri-County, and Wheat State study areas, the population density analyses performed by the KCC Staff demonstrate that Viaero proposes to serve the less

⁵⁴ KCC Staff Report at 16.

⁵⁵ *Id.* at 17.

⁵⁶ *Id.* at 20.

densely populated portion of each study area. This fact provides ample support for a conclusion by the Commission that redefining these study areas is unlikely to have any cream skimming effect.⁵⁸

In the case of the Twin Valley study area, while the population density of the wire centers that Viaero proposes to serve is slightly larger than the population density of the remaining wire centers in the study area, the difference in population densities (15.42 psm compared to 14.09 psm) is not so significant as to force a conclusion that the likely per-line costs in the wire centers that Viaero will serve would be appreciably lower than the per-line costs in the remaining wire centers.⁵⁹

Indeed, the de minimis differential of served and unserved areas in Twin Valley's study area, which yields a served-to-unserved ratio of 1.09:1, is much smaller than the differentials in multiple redefinition proposals the FCC has approved. For example, on May 23, 2005, the FCC concurred with a redefinition proposal by the Kansas Corporation Commission that had areas with larger differentials, including South Central Telephone (1.43:1) and United Telephone Association (1.40:1).⁶⁰ On February 1, 2005, the FCC concurred with the Michigan Public Utilities Commission's proposal to redefine the service areas of several rural ILECs, including Upper Pe-

⁵⁷ *Id.* at 17.

⁵⁸ See *Federal-State Joint Board on Universal Service, Advantage Cellular Systems, Inc.*, CC Docket No. 96-45, 19 FCC Rcd 20985, 20994 (2004); *Virginia Cellular*, 19 FCC Rcd at 1578-79.

⁵⁹ The Commission has concluded that opportunities for cream skimming do not exist where the areas to be served have "approximately the same population density" as the remaining portions of an incumbent LEC's service area. See *North Carolina RSA 3 Cellular Tel. Co.*, CC Docket No. 96-45, Order, 21 FCC Rcd 9151, 9157-58 (Wireline Comp. Bur. 2006) ("*Carolina West*"). In *Carolina West*, the Wireline Competition Bureau concluded that no cream skimming opportunities existed where the competitor proposed to serve wire centers with slightly higher population densities than the portions outside of its proposed ETC service area. (The population densities compared by the Commission were 69.21 and 157.00 for the competitive provider's wire centers, and 68.54 and 156.77 for the rural incumbent LECs' remaining wire centers, respectively. *Id.* at 9158.)

⁶⁰ See Public Notice, DA 05-464 (rel. Feb. 22, 2005) (effective May 23, 2005 by operation of FCC rules).

ninsula Telephone Company (1.63:1) and Wolverine Telephone Company (1.60:1).⁶¹ On December 28, 2004, the FCC concurred with a redefinition proposal by the Minnesota Public Utilities Commission, which included KMP Telephone Company (1.52:1).⁶² As with Twin Valley, none of the above ILECs had disaggregated their support.

In sum, Viaero is not proposing to serve “only the low-cost, high revenue customers in a rural telephone company’s study area.”⁶³ This fact, in conjunction with the availability of disaggregation to the affected incumbent LECs,⁶⁴ demonstrates that cream skimming will not result from a grant of this Petition.

2. Considering the Special Status of Rural Incumbent Carriers.

The Joint Board recommended that the Commission and the states should consider the rural carrier’s special status under the 1996 Act.⁶⁵ Congress mandated this public interest analysis in order to protect the special status of rural carriers in the same way it established special considerations for rural carriers with regard to interconnection, unbundling, and resale requirements.⁶⁶

In reviewing Viaero’s petition, the Kansas Commission weighed numerous factors in ultimately determining that the requested ETC designation was in the public interest. The Kansas Commission’s decision to accept the KCC Staff’s recommendation to redefine the study areas of Golden Belt, Tri-County, Twin Valley, and Wheat State to the wire center level was based in part on the KCC Staff’s conclusion that, because of the absence of any cream skimming con-

⁶¹ See Public Notice, DA 04-3506 (rel. Nov. 3, 2004) (effective Feb. 1, 2005 by operation of FCC rules).

⁶² See Public Notice, DA 04-3137 (rel. Sept. 29, 2004) (effective Dec. 28, 2004 by operation of FCC rules).

⁶³ See *Virginia Cellular*, 19 FCC Rcd at 1578.

⁶⁴ See nn.47-48, *supra*, and accompanying text.

⁶⁵ See *Joint Board Recommended Decision*, 12 FCC Rcd at 180.

⁶⁶ See *id.*

cerns, it would be unlikely that allowing Viaero to provide service below the study area level would impose any unfair disadvantage on the rural incumbent LECs involved.⁶⁷

3. Recognizing Administrative Burdens on Rural Incumbent Carriers.

The Joint Board recommended that the Commission and the states should consider any administrative burdens a rural incumbent LEC might face as a result of a study area redefinition.⁶⁸ In the instant case, Viaero's request to redefine the affected rural incumbent LECs' service areas along wire center boundaries is made solely for ETC designation purposes. Defining the service areas in this manner will not have any impact on the way the affected rural incumbent LECs calculate their costs, but is requested solely for the purpose of enabling Viaero to begin receiving high-cost support in those areas in the same manner as the rural incumbent LECs. Rural incumbent LECs may continue to calculate costs and submit data for purposes of collecting high-cost support in the same manner as they do now.⁶⁹

Should any of the affected rural incumbent LECs choose to disaggregate support out of concerns about cream skimming by Viaero or any other competitive carrier, this disaggregation of support should not represent an undue administrative burden. In any event, the Commission decided in the *Fourteenth Report and Order* to place any such burden on rural incumbent LECs, independent of service area redefinition, and made no mention of this process being a factor in service area redefinition requests. To the extent the affected rural incumbent LECs may find this process burdensome, the benefit of preventing cream skimming and the importance of promoting competitive neutrality should be held to outweigh any potential administrative burden involved.

⁶⁷ See KCC Staff Report at 16-18, 20.

⁶⁸ See *Joint Board Recommended Decision*, 12 FCC Rcd at 180.

⁶⁹ See KCC Staff Report at 8-9.

C. The Proposed Redefinition Is Consistent with the Commission's "Minimum Geographic Area" Policy.

In the *Highland Cellular* decision, the Commission declared that an entire rural incumbent LEC wire center "is an appropriate minimum geographic area for ETC designation"⁷⁰ The Commission reiterated this finding in the *ETC Report and Order*.⁷¹ As evidenced in the attached *KCC Order*,⁷² Viaero's designated ETC service area does not include any partial rural incumbent LEC wire centers. Accordingly, the instant request for concurrence with redefinition to the wire center level, and not below the wire center level, is consistent with Commission policy.

III. CONCLUSION.

Viaero stands ready to provide reliable, high-quality telecommunications services to consumers in rural Kansas by investing federal high-cost support in building, maintaining, and upgrading wireless infrastructure throughout its licensed service territories, thereby providing facilities-based competition in many of those areas for the first time.

Without the Commission's concurrence with the rural incumbent LEC service area redefinitions adopted by the Kansas Commission, Viaero will not be able to bring the benefits of increased availability of additional services, and increased investment in rural Kansas, to consumers in many areas in which Viaero is authorized by the Commission to provide service. The redefinition requested in this Petition will enable Viaero's ETC designation to take effect throughout its requested ETC service area in Kansas.

⁷⁰ *Federal-State Joint Board on Universal Service, Highland Cellular, Inc.*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6422, 6438 (2004) ("*Highland Cellular*").

⁷¹ See *ETC Report and Order*, 20 FCC Rcd at 6405.

⁷² See Appendix 1.

The relief proposed in this Petition is exactly the same in all material respects as that granted by the FCC and state commissions to numerous other carriers throughout the country, and the Commission is well within its authority to grant its prompt concurrence. Viaero submits that the benefits of permitting its ETC designation to take effect throughout its proposed service area are substantial, and those benefits will inure to rural consumers who desire Viaero's services. Accordingly, Viaero requests that the Commission grant its concurrence with the Kansas Commission's decision to redefine the rural incumbent LEC service areas so that each of the wire centers listed in this Petition constitutes a separate service area.

Respectfully submitted,

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